

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRUCE KEITHLY and DONOVAN LEE,	)	
Individually and on Behalf of all Others	)	No. C09-1485RSL
Similarly Situated,	)	
	)	
Interim Lead Plaintiffs,	)	ORDER GRANTING PLAINTIFFS’
	)	MOTION FOR AWARD OF
v.	)	ATTORNEYS’ FEES AND COSTS AND
	)	PARTICIPATION AWARDS TO THE
INTELIUS, INC., a Delaware Corporation; and	)	CLASS REPRESENTATIVES
INTELIUS SALES, LLC, a Nevada Limited	)	
Liability Company,	)	
	)	
Defendants	)	
	)	
v.	)	
	)	
ADAPTIVE MARKETING, LLC, a Delaware	)	
Limited Liability Company,	)	
	)	
Third Party Defendant.	)	
	)	
	)	

This matter comes before the Court on Plaintiffs’ Motion for Award of Attorneys’ Fees and Costs and Participation Awards to the Class Representatives (“Fee Petition”). The Court has reviewed the Partial Class Action Settlement Agreement, the Declarations of Mark A. Griffin, Victoria S. Nugent, Jim Shah, and Darren Kaplan in Support of Plaintiffs’ Motion for Award of Attorneys’ Fees and Costs and Participation Awards to the Class Representatives, as well as all

1 files, records, and proceedings to date in this matter.

2 IT IS HEREBY ORDERED:

3 1. The Court has reviewed all objections, if any, to the Fee Petition submitted  
4 directly to the Court, or provided to it by counsel for the parties, and overrules those objections.

5 2. Class Counsel is hereby awarded attorneys' fees in the amount of \$ \$625,000  
6 which the Court finds to be fair and reasonable.

7 3. Class Counsel is hereby awarded reimbursement of \$209,572.47 in reasonable  
8 expenses incurred in the prosecution of this action.

9 4. Class Representative Bruce Keithly is awarded \$10,000 and Class Representative  
10 Charles Hook is awarded \$2,500.

11 5. The Attorneys' Fees, Costs and Participation Awards set forth above shall be paid  
12 pursuant to the terms of the Settlement Agreement.

13 6. In making this award of attorneys' fees, reimbursement of costs, and the  
14 Participation Awards, the Court makes the following findings of fact and conclusions of law:

15 **FINDINGS OF FACT**

16 1. On October 19, 2009, plaintiffs Bruce Keithly, Donovan Lee and Edith Anna  
17 Cramer<sup>1</sup> filed the initial Class Action Complaint in this action against defendants Intelius, Inc.  
18 and Intelius Sales, LLC (collectively, "Intelius") alleging causes of action under the Washington  
19 Consumer Protection Act, Chapter 19.86 R.C.W. ("CPA"), and the common law claim for unjust  
20 enrichment. On March 24, 2010, plaintiff Matthew Bebbington filed a class action complaint  
21 making similar allegations against Intelius. Plaintiffs brought a Motion to Consolidate the  
22 Keithly and Bebbington Complaints and to Appoint Interim Class Counsel, which was granted  
23 on May 28, 2010 (ECF No. 59).

24 2. On June 2, 2010, plaintiff Laurence Paskowitz filed a putative class action  
25 complaint against Defendant in the same district, and was assigned Case Number 10-cv-00909-  
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<sup>1</sup> Plaintiff Edith Anna Cramer was voluntarily dismissed from this action on December 23, 2010 (ECF No. 105).

1 RSL ("Paskowitz Case"). On June 21, 2010, the Paskowitz Case was transferred and  
2 consolidated with the Keithly Case, 09-cv-1495RSL.

3 3. On July 22, 2010, a First Amended Consolidated Complaint was filed in the  
4 Keithly Case, alleging claims under the CPA, unjust enrichment, and violations of the Stored  
5 Communications Act, 18 U.S.C. § 2701, *et seq.*

6 4. On February 8, 2011, the Court entered an Order on Defendant's Motion for  
7 Judgment on the Pleadings, dismissing plaintiff Bebbington, dismissing plaintiff Lee's CPA  
8 claims, and dismissing all plaintiffs' Stored Communications Act claims. The Court denied  
9 Intelius' motion for judgment on the pleadings with respect to the remainder of the claims in the  
10 First Amended Consolidated Complaint. On February 23, 2011, a Second Amended  
11 Consolidated Class Action Complaint was filed in the Keithly Case, adding breach of contract  
12 claims.

13 5. On May 17, 2011, the Court granted plaintiffs' motion for reconsideration and  
14 reinstated plaintiff Lee's CPA claims.

15 6. On June 2, 2011, Plaintiffs filed a motion for class certification in the Keithly  
16 Case.

17 7. The parties in the Keithly Case have engaged in extensive discovery, including  
18 depositions, documentary and expert discovery, and filing two motions to compel.

19 8. On June 16, 2010, plaintiff Charles Hook filed a putative class action complaint  
20 against Defendant in the United States District Court, Middle District of Georgia, assigned case  
21 number 10-cv-00239-MTT ("Hook Case").

22 9. In connection with Intelius' dispositive motion, the U.S. District Court, Middle  
23 District of Georgia permitted discovery, which included depositions of three Intelius witnesses  
24 and Intelius' production of archived code and related engineering records.  
25  
26

1           10.     On March 28, 2011, the Georgia Court dismissed the Hook Case with prejudice.  
2     On April 26, 2011, plaintiff Hook filed a Notice of Appeal in the United States Court of Appeals  
3     for the Eleventh Circuit.

4           11.     On July 6, 2011 Intelius and Plaintiffs participated in a second mediation before  
5     Judge Edward A. Infante (ret.) in San Francisco, and entered into a settlement agreement, settling  
6     all claims in the Hook Case, and all claims relating to the IDP portion of the Keithly Case. On  
7     June 7, 2012, the parties entered into a Partial Class Action Settlement Agreement Between  
8     Plaintiffs and Intelius Inc and Intelius Co. LLC ("Settlement Agreement") as a result of the  
9     mediation. On August 6, 2012, the parties entered into and filed Addendum No. 1 to the  
10    Settlement Agreement. (ECF No. 280).

11           12.     On August 31, 2011, Intelius withdrew its motion for summary judgment to  
12    dismiss the IDP claim.

13           13.     The parties' Settlement Agreement provides for the following.

14           (a)     Settlement Class: All Persons residing in the United States who subscribed to  
15    Identity Protect from the first day the product was offered until the August 21, 2012 except for  
16    consumers who were not charged,( *e.g.* who cancelled before seven days) or have already  
17    received a full refund of any Identity Protect charges.

18           (b)     Settlement Amount: Defendant will pay \$2.5 million to establish a common fund  
19    for the benefit of the Settlement Class (the "Cash Consideration"). Benefits will be paid to  
20    Settlement Class Members from the net amount remaining (the "Net Settlement Fund") after the  
21    following amounts are deducted from the Cash Consideration: (1) attorneys' fees and costs; (2)  
22    administrative costs of the settlement, but excluding internal costs to Defendant to administer the  
23    settlement; and (3) Case Contribution Awards. Cash Payment is due in full forty-five (45) days  
24    following the Court's Final Approval of the Settlement. The portion funded by Defendant's  
25    insurer will be paid directly to the trust account for disbursement as described herein. Intelius  
26    will provide to the Settlement Class \$2.5 million in benefits in the form of electronic vouchers

1 for Intelius products (the “Voucher Fund”). These electronic vouchers will be fully transferable  
2 and will be valid for use at the Intelius website until 24 months (two years) following Intelius’  
3 provision of them to the Settlement Class.

4 (c) Injunctive Relief: Defendant and its successors, assigns, transferees, officers,  
5 agents, servants, employees, representatives, and all other persons or entities in active concert or  
6 participation with Defendant are hereby permanently enjoined and restrained from directly or  
7 indirectly engaging in the following acts or practices:

8 1. Displaying on any website that is owned, operated, and/or  
9 controlled by Defendant (“Defendant’s websites”) or on any third-party website any offer  
10 for a Membership Program involving a Free-to-pay Conversion Offer that does not  
11 comply with the following requirements:

12 a. In order for a consumer to accept the offer, the consumer  
13 must be required to provide the complete account information for the account the  
14 consumer wishes to be charged for the Membership Program at the time the  
15 consumer accepts the offer.

16 b. The offer must disclose Clearly and Conspicuously all  
17 material terms to the offer.

18 c. The offer’s material disclosures may not be made in fine  
19 print nor be in text accessible only through a hyperlink.

20 d. The offer must require the consumer’s Express  
21 Verifiable Acceptance.

22 e. The offer must Clearly and Conspicuously disclose a  
23 mechanism for declining the offer in a font and size as prominent as the  
24 mechanism for accepting the offer.

25 f. The mechanism for accepting the offer shall not  
26 misrepresent the nature of the action the consumer is taking.

1 g. Any offer using the term “free” or similar language must  
2 disclose any condition to the “free” offer Clearly and Conspicuously and in close  
3 proximity to the offer.

4 h. If the offer includes a Premium, there must be a  
5 disclosure in close proximity to the offer of the Premium that the consumer must  
6 accept the Free-to-pay Conversion Offer in order to obtain the Premium.

7 i. The offer must state Clearly and Conspicuously that by  
8 accepting it, the consumer is enrolling in a paid Membership Program that will be  
9 automatically charged to his or her account at the end of the trial period if the  
10 consumer does not cancel during the trial period.

11 2. Advertising, marketing, offering, and/or selling, directly or  
12 indirectly, a Membership Program involving a Free-to-pay Conversion Offer, including a  
13 third-party Membership Program where the advertisement for such program explicitly or  
14 implicitly misrepresents Defendant’s affiliation with the Membership Program.

15 3. Failing to provide a Clearly and Conspicuously displayed and  
16 labeled mechanism on Defendant’s websites for consumers to cancel and/or request  
17 refunds for any Membership Program owned and/or administered by Defendant.

18 4. Failing to honor any stated or published refund policy.

19 5. Where the requirements of this Settlement Agreement are not  
20 met, failing to provide a full refund to any consumer who claims not to have knowingly  
21 enrolled in one of Defendant’s Membership Programs that is marketed on a Free-to-pay  
22 Conversion Offer basis and who has not used any user-enabled or requested benefits or  
23 services of the program.

24 6. Failing to provide accessible, prompt, live or automated  
25 customer service to consumers for cancellation and refund requests relating to  
26 Membership Programs.

1                   7. Failing to cancel a consumer's membership in a program within  
2                   five (5) days of the consumer's request for such cancellation with no additional charges  
3                   accruing following the date of the request. Cancellation requires only suspension of  
4                   payment within five (5) days, not of service, which may be cancelled within a convenient  
5                   time.

6                   8. Failing to employ a transaction descriptor that alerts a  
7                   reasonable consumer to the nature and source of the charge subject to the limitations of  
8                   space imposed by credit card companies.

9                   9. Failing to satisfy in full the Class Compensation of \$5 million as  
10                  set forth in this Settlement Agreement.

11               14. On August 21, 2012, the Court granted preliminary approval to the Settlement  
12               Agreement and appointed Keller Rohrbach L.L.P., Cohen Milstein Sellers & Toll PLLC and  
13               Shepherd, Finkelman, Miller & Shah, LLP as Class Counsel (ECF. No. 281).

14               15. Class Counsel's motion for attorneys' fees and costs was filed with the Court on  
15               October 22, 2012, and posted on the Settlement Website, maintained by Plaintiffs' counsel  
16               located at [www.KRcomplexlit.com](http://www.KRcomplexlit.com), on November 1, 2012. This website is and has been  
17               hyperlinked to the Settlement Administrator-maintained website located at  
18               [www.IdentityProtectSettlement.com](http://www.IdentityProtectSettlement.com). As of the date of this filing, no objections have been made  
19               to the Motion for Award of Attorneys Fees and Costs.

20               16. Class Counsel has devoted significant time and effort to this case since its filing  
21               incurring a total of 15,072.94 hours through September 30, 2012. These hours were incurred by,  
22               among other things, investigating the claims against Defendants, reviewing and analyzing  
23               documents and information, preparing the Amended Complaint and amendments thereto,  
24               conducting necessary legal research, retaining and working with an expert, pursuing discovery,  
25               conducting necessary legal research, retaining and working with an expert, pursuing discovery,  
26               conducting necessary legal research, retaining and working with an expert, pursuing discovery,

1 preparing materials for class certification, filing a class certification motion, defending against  
2 Defendants' motion for summary judgment, engaging in extensive settlement negotiations, and  
3 preparing the necessary agreements and pleadings related to the settlement.

4 17. Significant additional attorney hours will be necessary after September 30, 2012,  
5 the date as of which the above numbers were compiled, to complete the remaining work on this  
6 case. In addition to incurring hours in connection with the final approval hearing, based on its  
7 experience with numerous other settlements of comparable cases, Class Counsel anticipates that  
8 it will spend a substantial amount of additional time over the next several months responding to  
9 inquiries from Class members and generally shepherding implementation of the settlement.  
10 Class Counsel does not intend to apply for reimbursement of additional fees, substantial as they  
11 may be, incurred after Final Approval.  
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13 18. The lodestar value of Class Counsel's time, billed at their regular rates, was  
14 \$5,668,177.40 as of September 30, 2012.  
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16 19. The attorneys' fees sought by Class Counsel in this case represent 11% of the  
17 total lodestar value of Class Counsel's time. The attorney's fees sought by Class Counsel in this  
18 case represents 25% of the Cash Consideration portion of the Settlement Amount.

19 20. During the course of this litigation, Class Counsel has advanced costs and  
20 expenses in the amount of \$209,572.47.  
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22 21. To date, Class Counsel has received no compensation for either their time or  
23 expenses over the nearly three years that this case has been pending. Class Counsel's fees and  
24 expenses are totally contingent and dependent on a fee and expense award by this Court.

25 22. Class Representative Bruce Keithly was subjected to significant discovery and  
26 both Keithly and Class Representative Charles Hook participated in the mediation process and



1 assisted with the prosecution of this lawsuit.

2 23. Keller Rohrbach L.L.P., Cohen Milstein Sellers & Toll PLLC and Shepherd,  
3 Finkelman, Miller & Shah, LLP, Class Counsel in this action, are well-known class action law  
4 firms with extensive experience in class action litigation.

5 24. These three firms undertook this action without participation by any other firm  
6 and were solely responsible for its outcome.

7  
8 Based upon the foregoing Findings of Fact, the Court hereby makes the following  
9 Conclusions of Law.

10 **CONCLUSIONS OF LAW**

11 1. This Court makes an award of fees to Class Counsel pursuant to the percentage  
12 method. An attorneys' fee award of \$ 625,000, representing 25% of the Cash Consideration,  
13 which is a 11% of the lodestar amount incurred by Class Counsel, and 1,000 vouchers for  
14 Intelius's services, - is fair and reasonable under all the circumstances.

15 2. Reimbursement of the costs and expenses advanced by Class Counsel during the  
16 course of this litigation, \$209,572.47, is fair and reasonable under the circumstances.

17 3. An award of \$2,500 to Class Representative Charles Hook, who participated in  
18 the mediation process and assisted in the prosecution of this lawsuit, is fair and reasonable under  
19 the circumstances.


20 4. An award of \$10,000 to Class Representative Bruce Keithly, who responded to  
21 discovery, participated in the mediation process, prepared for and sat for a deposition, attended  
22 hearings, and assisted in the prosecution of this lawsuit, is fair and reasonable under the  
23 circumstances.

24 5. The Court finds that electronic notice, together with the published notice,  
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approved by the Court, is the best practicable notice under the circumstances and is as likely as any other form of notice to apprise potential Settlement Class members of the Settlement Agreement, and their rights to object to the Fee Petition. The Court further finds that such notice is reasonable, that it constitutes adequate and sufficient notice to all persons entitled to receive notice, and that it meets the requirements of Due Process. Finally, the Court finds that the filing of the Fee Petition on October 22, 2012, and the posting of the contents of the Fee Petition along with all of the materials supporting that petition meets the requirement of *In re Mercury Interactive Corp. Sec. Litig.*, No. 08-17372, 2010 U.S. App. LEXIS 17189 (9th Cir. Aug. 18, 2010).

IT IS SO ORDERED.

DATED: December 6, 2012



Robert S. Lasnik  
United States District Judge

**APPROVED AS TO FORM:**

DATED: November 29, 2012

**KELLER ROHRBACK L.L.P.**

By: s/ Karin B. Swope

Mark A. Griffin, Esq.

Karin B. Swope, Esq.

Attorneys for Plaintiffs

BRUCE KEITHLY and DONOVAN LEE,

Individually and on Behalf of All Others

Similarly Situated

1 DATED: November 29, 2012

**COHEN MILSTEIN SELLERS & TOLL PLLC**

2 By: s/ Andrew N. Friedman

3 Andrew N. Friedman, Esq.

4 Victoria S. Nugent, Esq.

Attorneys for Plaintiffs

5 BRUCE KEITHLY and DONOVAN LEE,

Individually and on Behalf of All Others

6 Similarly Situated